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FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

AUDIT REFERRAL: 07-04
DATE REFERRED: June 26, 2007
DATE ACTIVATED: July 5, 2007

STATUTE OF LIMITATIONS: January 9, 2008-
December 15, 2009¹

SOURCE: AUDIT REFERRAL

RESPONDENTS: Gephardt for President, Inc., and S. Lee Kling, in his official
capacity as treasurer

RELEVANT STATUTES

AND REGULATIONS: 2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(b)(1)(A)
2 U.S.C. § 441a(f)
26 U.S.C. § 9035(a)
26 U.S.C. § 9038(a)
11 C.F.R. § 103.3(b)(3)
11 C.F.R. § 106.2(a)(1)
11 C.F.R. § 110.1(k)

INTERNAL REPORTS CHECKED: Audit Documents
Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter was generated by a referral from the Commission's Audit Division following an
audit conducted pursuant to 26 U.S.C. § 9038(a) of Gephardt for President, Inc. ("the Committee").

¹ This matter involves over 200 individual checks relating to excessive contributions received between January 10, 2003 and December 15, 2004. A relatively small percentage of the excessive contributions (eight checks) were received in January 2003. March, June, and September 2003 were the months with the most excessive contributions, involving approximately 25-30 checks. The Iowa state expenditure violation occurred on January 11, 2004.

1 the publicly-financed presidential primary campaign committee of Richard A. Gephardt, a
2 candidate for the Democratic nomination for President in 2004. The audit covered the period
3 January 7, 2003, when the Committee registered with the Commission, through April 30, 2004,
4 with continuing limited reviews of additional receipts and expenditures through June 30, 2004 to
5 determine whether the candidate was eligible for additional matching funds. The Commission
6 approved the Report of the Audit Division on the Committee on June 11, 2007, and on June 25,
7 2007, two findings were referred to the Office of the General Counsel. Attachment 1.

8 Based on the information set forth in the Final Audit Report ("FAR"), we recommend that
9 the Commission make reason to believe findings as follows:

- 10 • The Gephardt Committee accepted contributions in excess of the limitations of the
11 Federal Election Campaign Act of 1971, as amended, ("the Act") in violation of
12 2 U.S.C. § 441a(f). (Attachment 1 at 1-5).
- 13
14 • The Gephardt Committee exceeded the Iowa state expenditure limitation for
15 Presidential candidates in violation of 2 U.S.C. § 441a(b)(1)(A). (Attachment 1 at
16 5-6).
- 17

18 The referral's first finding concludes that the Gephardt Committee received excessive
19 contributions totaling \$211,556. 2 U.S.C. § 441a(a)(1)(A). Pursuant to audit report
20 recommendations, the Gephardt Committee has refunded or disgorged \$97,556 of these excessive
21 contributions.² The balance of excessive contributions, \$114,000, were eligible for reattribution to
22 another contributor under 11 C.F.R. §§ 103.3(b)(3) and 110.1(k), but the Gephardt Committee
23 failed to comply with the 60-day time period allowed for reattribution under the applicable
24

² Because sampling is used to identify the excessive contributions, excessive contributions can be resolved through refunds or through a payment to the U.S. Treasury. Of the \$97,556 in refundable excessive contributions, the Gephardt Committee made \$37,000 in refunds to contributors and \$60,556 in payments to the U.S. Treasury.

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1 regulations.³ However, during the audit, the Gephardt Committee was permitted to make late
2 presumptive reattributions in lieu of making refunds, consistent with a similar Commission
3 instruction made in the audit of Martinez for Senate. Notwithstanding these belated measures, the
4 Gephardt Committee accepted excessive contributions. Therefore, we recommend that the
5 Commission find reason to believe that the Gephardt Committee violated 2 U.S.C. § 441a(f) by
6 accepting contributions in excess of the limitations of the Act.

7 The referral's second finding concludes that the Gephardt Committee exceeded the Iowa
8 state expenditure limitation for Presidential candidates by \$162,943.⁴ 2 U.S.C. § 441a(b)(1)(A).
9 No candidate who is eligible to receive payments under the Presidential Primary Matching Payment
10 Account Act may make expenditures in any one State that "exceed the greater of 16 cents
11 multiplied by the voting age population of the State . . . , or \$200,000." 2 U.S.C. § 441a(b)(1)(A).
12 No candidate shall knowingly incur qualified campaign expenses in excess of the expenditure
13 limitations applicable under section 441a(b)(1)(A). 26 U.S.C. § 9035(a). No candidate or political
14 committee shall knowingly make any expenditure in violation of any provision of section 441a.
15 2 U.S.C. § 441a(f).

³ The Commission's regulations provide for two types of reattribution in instances when a contribution is made by a written instrument upon which more than one name is imprinted. First, pursuant to 11 C.F.R. § 110.1(k)(3)(ii)(A), contributors may send in a writing signed by the contributors whose names appear on the instrument attributing the contribution among them (e.g. a "written reattribution"). Second, under 11 C.F.R. § 110.1(k)(3)(ii)(B), a committee may notify contributors of its intention to reattribute the contribution among the names printed on the instrument but provide the contributor the opportunity to request a refund instead of the reattribution (e.g. "presumptive reattribution"). In each case, the reattribution must be executed within 60 days of the committee's receipt of the original contribution. The "presumptive reattribution" regulation was promulgated after the 2002 election cycle (January 1, 2003 effective date) to address so-called "paper" excessive contributions. "Paper" excessive contributions occurred when it appeared contributors intended to have their contributions attributed among joint account holders, but failed to submit two signatures on the written instrument or failed to submit a written reattribution form (e.g. they did not submit the appropriate "paper" and this caused their excessive contribution).

⁴ The facts related to this finding were not disputed by the Gephardt Committee, which instead, offered mitigating information during the audit. For instance, the Committee asserted that it had established accounting controls to help it comply with state expenditure limitations.

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1 For Iowa in 2004, the limitation was \$1,343,757 and the Gephardt Committee spent
2 \$1,506,700, an amount that was \$162,943 in excess of the limitation.⁵ Therefore, we recommend
3 that the Commission find reason to believe that the Gephardt Committee violated 2 U.S.C.
4 §§ 441a(b)(1)(A), 441a(f) and 26 U.S.C. § 9035(a) by making expenditures in excess of the Iowa
5 state expenditure limitation.⁶

⁵ Expenditures are allocated to a particular State if they are incurred by a candidate's authorized committee for the purpose of influencing the nomination of that candidate for the office of President with respect to that State. 11 C.F.R. § 106.2(a)(1).

⁶ In the most recent MUR involving expenditure limitation violations, involving Dole for President, the Commission did not pursue the candidate for liability, although under the precise wording of the applicable statutes there is a basis to do so. *See* MUR 4382 et al. At this time, assuming that this matter will be resolved in pre-probable cause conciliation, we see no need to depart from the Dole precedent.

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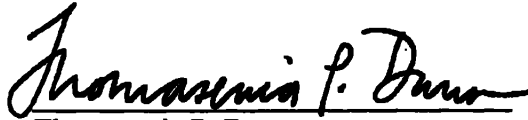
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11 **III. RECOMMENDATIONS**


- 12 1. Open a MUR in AR 07-04;
- 13 2. Find reason to believe that Gephardt for President, Inc. and S. Lee Kling, in his official
- 14 capacity as treasurer, violated 2 U.S.C. § 441a(f) by accepting contributions in excess of
- 15 the limitations of the Act;


- 1 3. Find reason to believe that Gephardt for President, Inc. and S. Lee Kling, in his official
2 capacity as treasurer, violated 2 U.S.C. §§ 441a(b)(1)(A) and 441a(f) and 26 U.S.C.
3 § 9035(a) by making expenditures in excess of the Iowa state expenditure limitation;
4 4.
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7 5. Approve as Factual and Legal Analysis the Report of the Audit Division on Gephardt
8 for Congress, dated June 25, 2007; and
9 6. Approve the appropriate letters.

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Attachments:

1. Report of the Audit Division on Gephardt for President, Inc.

Finding 2. Receipt of Contributions that Exceed Limits

Summary

A review of contributions from individuals indicated that GFP failed to resolve excessive contributions totaling \$225,792. These contributions were excessive because GFP records did not include documentation to support the reattribution of the excessive portion to another individual. In response to the preliminary audit report, GFP demonstrated one contribution was not excessive and, therefore, a revised projection for excessive contributions totaling \$211,536 was calculated. GFP also demonstrated that notifications were sent to contributors eligible for presumptive reattributions totaling \$114,000 and that refunds were made to contributors for \$37,000 of the excessive amount. As a result, the revised payment payable to the U.S. Treasury is \$60,536 (\$211,536 - \$114,000 - \$37,000).

Legal Standard

Authorized Committee Limits. An authorized committee may not receive more than a total of \$2,000 per election from any one person. 2 U.S.C. §441a(a)(1)(A) and (f); 11 CFR §§110.1(a) and (b) and 110.9(a).

Handling Contributions That Appear Excessive. If a committee receives a contribution that appears to be excessive, the committee must either:

- Return the questionable check to the donor; or
- Deposit the check into its federal account and:
 - o Keep enough money in the account to cover all potential refunds;
 - o Keep a written record explaining why the contribution may be illegal;
 - o Include this explanation on Schedule A-P if the contribution has to be itemized before its legality is established;
 - o Seek a reattribution of the excessive portion, following the instructions provided in FEC regulations (see below for an explanation of reattribution); and
 - o If the committee does not receive a proper reattribution within 60 days after receiving the excessive contribution, refund the excessive portion to the donor. 11 CFR §§103.3(b)(3), (4) and (5) and 110.1(k)(3)(ii)(B).

Joint Contributions. Any contribution made by more than one person (except for a contribution made by a partnership) must include the signature of each contributor on the check or in a separate writing. A joint contribution is attributed equally to each donor unless a statement indicates that the funds should be divided differently. 11 CFR §110.1(k)(1) and (2).

Reattribution of Excessive Contributions. Commission regulations permit committees to ask donors of excessive contributions whether they had intended their contribution to be a joint contribution from more than one person and whether they would like to reattribute the excess amount to the other contributor. The committee must inform the contributor that:

1. The reattribution must be signed by both contributors;
2. The reattribution must be received by the committee within 60 days after the committee received the original contribution; and
3. The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3)(A).

Within 60 days after receiving the excessive contribution, the committee must either receive the proper reattribution or refund the excessive portion to the donor. 11 CFR §§103.3(b)(3) and 110.1(k)(3)(ii)(B). Further, a political committee must retain written records concerning the reattribution in order for it to be effective. 11 CFR §110.1(l)(5).

Notwithstanding the above, any excessive contribution that was made on a written instrument that is imprinted with the names of more than one individual may be attributed among the individuals listed unless instructed otherwise by the contributor(s). Within 60 days of receipt of the contribution the committee must inform each contributor:

1. How the contribution was attributed; and
2. The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3)(B).

Sampling. In conducting an audit of contributions, the Commission uses generally accepted statistical sampling techniques to quantify the dollar value of related audit findings. Apparent violations (sample errors) identified in a sample are used to project the total amount of violations. If a committee demonstrates that any apparent sample errors are not errors, the Commission will make a new projection based on the reduced number of errors in the sample. Within 30 days of service of the final audit report, the committee must submit a check to the United States Treasury for the total amount of any excessive contributions not refunded, reattributed, or redesignated in a timely manner. 11 CFR § 9038.1(f).

Facts and Analysis

A review of contributions from individuals indicated that, at the time of the Preliminary Audit Report, GFP failed to resolve excessive contributions totaling \$225,792.¹ The contributions identified are excessive for one of the following reasons:

Contribution by check with two names imprinted- Eleven contributions were identified as excessive because they were made by checks imprinted with two names and signed by only one of the individuals. GFP attributed these contributions to both individuals whose names were imprinted on the checks. Such action required that within 60 days of the contribution, GFP either obtain a signed reattribution from the contributors or simply inform the individuals of how the contribution was attributed and offer a refund of the excessive portion. GFP did neither. As a result, the entire amount of the contribution was attributed by the Audit staff to the individual that signed the check.

Contribution by check with one name imprinted- Seven contributions were identified as excessive because they were made by checks imprinted with one name and attributed by GFP to two individuals. GFP records did not include a signature from the second individual acknowledging them as an account holder. As a result, the entire amount of each contribution was attributed by the Audit staff to the individual who signed the check.

¹ Represents the projected amount of excessive contributions in the sample population (\$218,292) as well as additional excessive contributions (\$7,500) identified by the Audit staff from a separate audit.

Contribution by credit card- Five contributions were identified as excessive because they were made by credit cards not attributed to more than one individual. The documentation provided in support of these contributions were credit card authorizations that resulted from telemarketing or direct mail solicitations from one individual in amounts exceeding the \$2,000 limit. The excessive portion was reattributed to another individual without obtaining the signature of the second individual acknowledging both the contribution and joint liability for the credit card used to make the contribution.

Although GFP's receipts database indicated that for a few of the excessive contributions a reattribution letter may have been sent to the contributor, no documentation to support these actions was maintained in GFP's records.

Subsequent to fieldwork, a schedule of excessive contributors was provided to GFP. In response, GFP stated that contribution refunds were issued to some of the identified contributors in February and March of 2005.²

Preliminary Audit Report Recommendation

The Audit staff recommended that GFP provide documentation that the contributions identified as errors were not excessive. Such documentations should have included copies of timely negotiated refund checks or timely signed and dated reattribution letters. Also, for those contributions made by a check with more than one name imprinted, it was recommended that GFP provide timely notifications to the contributors of the presumptive action taken by GFP. Absent such documentation, the Audit staff recommended that GFP make a payment of \$225,792 to the U.S. Treasury.

Committee Response to Preliminary Audit Report & Audit Staff's Assessment

For the eleven excessive contributions that were made by checks with two names imprinted, GFP stated that these contributions represented 62.7% of the excessive amount in the sample and could be presumptively attributed among both spouses and should not be regarded as excessive contributions. According to GFP, the Commission removed the requirement to obtain written authorization prior to attributing contributions between two individuals whose names were imprinted on the check. To demonstrate that five of these contributions were intended to be joint contributions, GFP provided copies of letters sent for matching fund purposes that instructed the individual who did not sign the contribution check to verify the amount of their contribution. These letters were not considered valid reattributions because GFP did not obtain the requisite signatures. Further, these letters were not considered valid notifications of presumptive reattributions by GFP because the letters fail to adequately inform the individuals of how their contribution was attributed and offer a refund of the excessive portion. GFP did not provide any new documentation for the remaining six excessive contributions made by checks with two names imprinted.

² The audit notification letter dated May 12, 2004 explained that untimely refunds for impermissible contributions were not recognized by the Commission and payment to the U.S. Treasury may be required for such refunds identified as a result of the audit. Subsequent to the preliminary audit report, the Commission provided GFP the opportunity to make such refunds to identified individuals instead of the U.S. Treasury.

For two of the contributions that were made by checks with only one name imprinted, GFP provided copies of letters sent to contributors for matching fund purposes that instructed the individual whose name was not imprinted on the contribution check to verify the amount of their contribution and that the account contained their personal funds. For one of these contributions, GFP provided a copy of a personal statement signed by both contributors which authorized the spouse to write a check to GFP on her behalf. Since it appears that GFP received a timely reattribution of the excessive amount to the spouse, the Audit staff accepted the corrective action taken by GFP for this contribution.³ The Audit staff maintains that the other contribution made by a check with only one name imprinted is excessive because the requisite signature to validate a reattribution was not obtained.

GFP also disputed an excessive contribution that resulted from the same person signing contribution checks from two different accounts; one account in the contributor's name and another from a personal expense account of her spouse. GFP argued that unless the spouse did not have access to his own bank records, it would seem improbable that funds from his account would have been contributed without his consent. The Audit staff maintains this contribution is excessive in accordance with 11 CFR §104.8(c) which states that absent evidence to the contrary, any contribution made by check, money order, or other written instrument shall be reported as a contribution by the last person signing the instrument prior to delivery to the candidate or committee.

For the five excessive contributions that were made by credit card, GFP questioned whether the sample projection accurately reflected the level of possible excessive contributions made with a credit card. According to GFP, credit card transactions by paper represented only 8.4% of the total amount given to GFP yet they represented 16.9% of the sampling. The generally accepted statistical sampling technique used by the Audit staff to project the violation amount in this finding is based solely on the dollar value, not the transaction count, of contributions and makes no distinction as to the method by which the contribution was made.

In summary, GFP's response to the preliminary audit report resolved one excessive contribution identified in the sample. As a result, the projection for excessive contributions was revised to \$211,556.

Subsequently, as a result of Commission decisions in other audits, GFP was provided an opportunity to send notifications to contributors whose contributions would have been eligible for "presumptive reattribution" pursuant to 11 CFR §110.1(k)(3)(B) (See Legal Standard above), or to make refunds. These actions would obviate the need to make a payment to the U.S. Treasury for such contributions. In response, GFP demonstrated that notifications of presumptive reattribution were sent for excessive contributions totaling \$114,000 and provided evidence of untimely contribution refunds for excessive contributions totaling \$37,000. Therefore, the remaining amount due to the U.S. Treasury is \$60,556 (\$211,556 - \$114,000 - \$37,000).

³ The Audit staff notes that the letter sent to the contributor did not include the offer of a refund in accordance with 11 CFR §110.1(k)(3)(A).

Recommendation

The Audit staff recommends that, within 30 days of service of this report, GFP pay \$60,556 to the U.S. Treasury.

Finding 3. Expenditures that Exceed Iowa Spending Limit

Summary

A review of expenditures indicated that GFP exceeded the Iowa spending limitation by \$162,943. The Audit staff recommended that GFP provide evidence that allocable expenditures did not exceed the Iowa spending limitation. In response to the preliminary audit report, GFP explained the procedural safeguards and circumstances related to complying with the Iowa spending limit, but did not demonstrate that the limitation had not been exceeded. The Commission decided not to seek repayment to the U.S. Treasury for these expenditures.

Legal Standard

State Expenditure Limits. No candidate for the office of President of the United States who is eligible to receive Matching Funds may make expenditures in any one state aggregating in excess of the greater of 16 cents multiplied by the voting age population of the state, or \$200,000 as adjusted by the Consumer Price Index. 2 U.S.C. §441a(b)(1)(A).

State Allocation. An authorized committee shall allocate expenditures to a particular state if the purpose is to influence the nomination of the candidate for the office of President with respect to that state. If the expenditure influences the nomination of that candidate in more than one state, then the committee shall allocate to each state on a reasonable and uniformly applied basis. Allocable expenses include media, mass mailings, overhead, special telephone programs, and polling. 11 CFR §106.2(a)(1) and (b)(1)(2)

Exempt Activity. The candidate may exclude the following expenses from the expenditure limit of a particular state:

- Fundraising exemption 11 CFR §110.8(c)(2)- Up to 50% of the candidate's total expenditures,
- Compliance exemption 11 CFR §106.2(G)(iii)- 10% of overhead expenses, and
- Mass Mailing exemption 11 CFR §110.8(c)(2)- 100% of expenses for mass mailings up to 28 days before the state's primary or caucus.

Repayment. The Commission may determine that a portion of the matching funds received by a Candidate was used for non-qualified campaign expenses. Examples of repayment determinations under this section include a determination that the Candidate has made expenditures in excess of the limitations at 11 CFR §9035. (11 CFR § 9038.2(b)(2))

Facts and Analysis

The Iowa spending limitation for Presidential candidates in the primary election was \$1,343,757/
An analysis of GFP expenditures indicated \$1,506,700 should have been applied to Iowa

spending limitation. Therefore, GFP's allocable expenditures exceeded the Iowa spending limitation by \$162,943.

GFP allocation records indicated that \$1,550,250 should have been applied to the Iowa spending limitation. As noted above, the Audit staff calculation is \$1,506,700. The difference of \$43,550 reflects GFP's allocation of certain expenses for advertisement tracking and focus groups that did not require allocation to the Iowa spending limitation.

At the conclusion of fieldwork, GFP was provided a schedule comparing GFP and Audit staff calculations for amounts applicable to the Iowa spending limitation. In response, GFP demonstrated that some amounts originally applied to the Iowa spending limitation were in fact, not allocable. The figures presented above are net of these items.

Preliminary Audit Report Recommendation

The Audit staff recommended that GFP provide evidence that allocable amounts did not exceed the Iowa spending limitation. Absent such evidence, the Audit staff stated that it would recommend that the Commission make a determination that \$31,589 ($\$162,943 \times$ repayment ratio of 19.3868%⁴) was repayable to the U.S. Treasury.

Committee Response to Preliminary Audit Report & Audit Staff's Assessment

GFP stated that it employed numerous and extensive procedures to comply with Iowa spending limitation including the use of a software system and a full-time employee to manage the review and coding of state allocable expenditures. GFP also stated that it used and enforced budgets to ensure compliance with the limit. According to GFP, two circumstances contributed to exceeding the Iowa spending limit. First, the amount of media refunds for broadcast time purchased before the Iowa caucuses were less than expected. Second, GFP stated a significant amount of allocable expenses including special telephone programs were incurred toward the end of the caucuses and only after the election did they realize that those expenses were allocable to the Iowa spending limitation.

Although we acknowledge GFP had procedures in place to comply with the Iowa spending limitation, the Audit staff maintains that GFP exceeded the Iowa spending limitation. Therefore, in accordance with 11 CFR §9038.2(b)(2), the Audit staff calculated a repayment of \$27,746 ($\$154,787 \times$ repayment ratio of 17.9250%) for non-qualified expenses paid before the point when matching funds, to which the Candidate was entitled, were no longer contained in GFP accounts.⁵

At its May 31, 2007 meeting, the Commission decided not to seek repayment to the U.S. Treasury for these expenditures.

⁴ This figure (19.3868%) represents GFP's repayment ratio as calculated pursuant to 11 CFR §9038.2(b)(2)(iii). Subsequent to the preliminary report, the repayment ratio was adjusted to (17.9250%) to account for matching funds determined to be in excess of entitlement totaling \$378,408.

⁵ Expenses totaling \$8,156 ($\$162,943 - \$154,787$) were paid after the Candidate's accounts had been purged of all matching funds. As a result, these expenses are not subject to any repayment.